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Department of Water Resources

Parties' Names:

May Farms, Ltd.,
Sand Springs Ranch Partnership,
and Faulkner Land and Livestock Company

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6-12

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA) Subcase Nos. 36-00021, 36-00048A, 36-00049,
) 36-00051A, 36-10283A and 36-15168
)
Case No. 39576) AFFIDAVIT OF JENNIFER J. VANSANT
) RE: NOVEMBER 22, 1995 HEARING
) TRANSCRIPT
)
_____)

STATE OF IDAHO)
) ss
County of Ada)

Jennifer J. Vansant, being first duly sworn upon oath, hereby deposes and says:

1. I am the assistant of Josephine P. Beeman and Dana L. Hofstetter, counsel of record for Sand Springs Ranch Partnership, May Farms, Ltd. and Faulkner Land and Livestock Company. The information contained in this affidavit is of my own personal knowledge and is true and correct to the best of that knowledge.

2. On May 30, 1996, I contacted Tiffany Hudak at the Snake River Basin Adjudication court to request a copy of the November 22, 1995 hearing transcript for subcase numbers 36-00021, 36-00048A, 36-00049, 36-00051A, 36-10283A and 36-15168. She referred

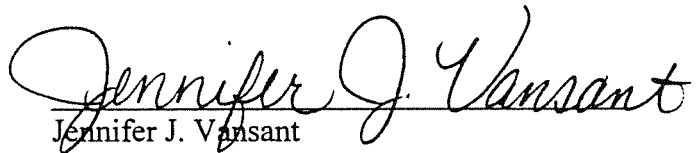
me to Duane Schneberger, court reporter for the Snake River Basin Adjudication (SRBA) court. Mr. Schneberger advised me that the hearing had been taped but that no transcript had yet been prepared. He referred me back to Tiffany Hudak to obtain copies of the tapes.

3. Tiffany Hudak and I agreed that she would Federal Express copies of the November 22, 1995 hearing tapes in these subcases to me. In response to my request I received five audio cassette tapes. Shortly after receiving the tapes I began the process of transcribing them into printed format.

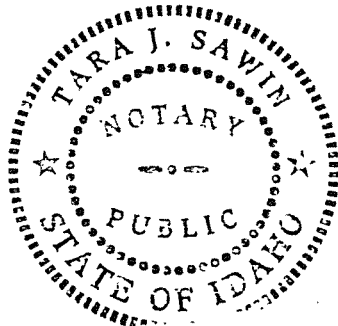
4. Attached hereto as Exhibit A are transcribed portions of the November 22, 1995 hearing tapes prepared by me in which Josephine P. Beeman makes reference to specific information contained in the Idaho Department of Water Resources claims investigation files and claim investigation reports.

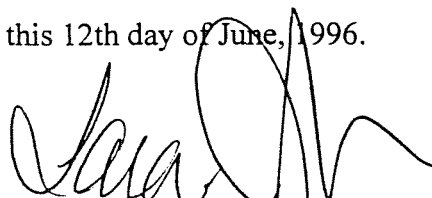
5. Further your affiant sayeth not.

Dated this 12th day of June, 1996.


Jennifer J. Vansant

SUBSCRIBED and SWORN to before me this 12th day of June, 1996.

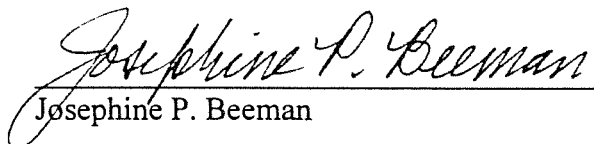



NOTARY PUBLIC FOR IDAHO
Residing at: Boise Idaho
My Commission Expires: 8/17/01

CERTIFICATE OF SERVICE

I certify that on the 12th day of June, 1996, I caused a true and correct copy of the foregoing document to be served on the following person(s) in the manner designated:

Patrick D. Brown	☐	U.S. Mail
Hepworth, Lezamiz & Hohnhorst	☐	Fed-Ex
Chartered	☐	Hand Delivery
133 Shoshone St. N.	☒	Facsimile
Twin Falls, Idaho 83301		
Chief, Natural Resources Div.	☒	U.S. Mail
Office of Attorney General	☐	Fed-Ex
P. O. Box 44449	☐	Hand Delivery
Boise, Idaho 83711	☐	Facsimile
Jeffrey C. Fereday	☒	U.S. Mail
Givens, Pursley & Huntley	☐	Fed-Ex
P.O. Box 2720	☐	Hand Delivery
Boise, Idaho 83701-2720	☐	Facsimile
Brent King	☒	U.S. Mail
Idaho Dept. of Water Resources	☐	Fed-Ex
1301 N. Orchard	☐	Hand Delivery
Boise, Idaho 83706	☐	Facsimile


Josephine P. Beeman

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Mr. Brown: Your honor, I would agree with Mr. Fereday, I think the most expedient way would be, the next thing we do is we argue the Cranney Motion to Strike and then we take up the motions for leave in all the cases together.

Ms. Beeman: Your honor, I, I'm afraid I just cannot agree to that. I have four motions that were already scheduled this morning. It is 5 minutes to 11 and I have not yet made any of my substantive arguments. I'd be willing to make the motions on the four that involve me and Ambrose and then at that point when we go to ones in common with Cranney Bros. then the Motion to Strike could be argued. But I would like the Court to next hear my substantive arguments on behalf of those clients.

Mr. Fereday: Your honor, given that comment, we, we do not wish to invade their time. So, that's, we haven't consulted with them about this kind of timing. It was just my suggestion, so I would accede to their request.

S.M. Dolan: Ok, so when we come back, we'll continue on uh with the motions and the amended motion to file late responses on the four subcases we've already talked about, 21B, 51A, 10283A and 15168. Thank you counsel.

Mr. Fereday: Thank you.

S.M. Dolan: Counsel we're back on the record now, we're continuing, uh in four subcases. Those numbers are 36-21b, 51a, 10283a and 15168. We're still November 22nd and lets see, now we're gonna consider the motions and amended motion to file late response and Ms. Hofstetter or Ms. Beeman? They're your motions I'll let you speak.

Ms. Beeman: Thank you your honor. I will make a substantive argument first which applies equally to each of the four subcases. And then at the end of the argument I will discuss specific facts related to each of the subcases. The first point that May Farms Ltd. and Sand Springs Ranch would like to make to the Court that this is a Rule 55(c) proceeding, not a Rule 60(b) proceeding. Judge Hurlbutt's July 28 decision states that the Court will review motions to file late responses under criteria similar to the criteria in Rule 55(c) which deals with the set aside entry of default. The Rule 55(c) good cause standard is more lenient than the Rule 60(b) standard. And the case which we cite in support of that we have copied and provided to the Court. It's McFarland vs. Curtis, a 1993 Court of Appeals case. This good cause standard has three components. Is the default willful? Will setting aside the default cause prejudice? And three, has a meritorious defense been presented? Another way to state that is that the moving party, that would be Sand Springs Ranch and May Farms Ltd., must show some excuse for failure to answer. In addition it must if a meritorious defense exists and a policy of due process cases on the merit should be recognized. This is discussed at page 936 of the McFarland decision and has been highlighted. In these specific cases good cause exists to permit the filing of late responses. The default was not willful. And there was an excuse for failure to respond. The moving parties relied on the Director's Report and IDWR's defense of the report. Initially I had planned on uh discussing some of the matters that were already discussed in the recent argument of the Motion to Strike the Affidavits of May Farms Ltd. and Ambrose and Sand Springs Ranch. I will just state briefly that the affidavits contain uh allegations which show that the default was not willful, that there was a reliance on the Director and it was the Director's removal statutorily as a party to these subcases that necessitated the filing of these late, uh Motions for Late Response. In addition, we have referred to the deposition material without waiving our objection to the use of the deposition material as further support for the parties' uh excuse for failure to file responses during the response period in Basin 36.



When the Director was removed as a party, the ground water users, May Farms Ltd. and Sands Springs Ranch, were unable to litigate and advocate in favor of the Director's position, which they supported. In addition, as soon as the decision from the Idaho Supreme Court confirming that the Director was removed as a party was final, the ground water users joined in a motion to amend A01 which led to the July 28 decision, Judge Hurlbutt's. And then the ground water users filed the Motions to File Late Response in the time frame set by the Court, the August 18th deadline. The second standard to be looked at is whether setting aside the default would cause prejudice. Each of the six subcases that are before the Court on behalf of my clients are, are subcases where there has been no discovery on file, there has been no effort to bring the objected rights to trial and no progress has been made on the six subcases, so there would be no prejudice, no delay in those cases by granting these late, or these Motions for Late Response. The final standard is that a meritorious defense has been submitted. And I'd like to speak generally here, cause the cases for which the late responses, Motions to File Late Responses, are before the Court represent instances where there are great differences between what was claimed by Mr. Brown's clients and what the Department recommended after its investigation. And I have a demonstrative chart which I have prepared for the Court which is based on, solely on, what was claimed and those are in the investigative records which are part, appended to my affidavit which is before the Court in which supports the Motion to File Late Responses. In the two instances where Ambrose has filed Motions to File Late Response, in one instance the Hagerman Water Users Association, the claim was for 493 acres. The Director's investigation, which is number 15168. In each file there is a claim investigation file and a claim verification report which shows the date that the investigation, the field investigation was done. The claim verification report shows a field exam was done on July 25, 1990 by the Department of Water Resources. The Department investigative file shows that 334 acres were actually found to be irrigated. That's a difference of almost a 160. The claimed flow rate by the Hagerman Water Users Association was 36 cfs. The Director recommended, based on irrigated acres, 7.43 cfs. That is a huge difference. That is the kind of justiciable controversy contemplated by Rule 55(c) where the Motion to File Late Response is on its face, a matter that will not waste the resources of the Court because there is, there is a matter that needs to be, needs to be looked at on its merit. The other matter where Mr. Ambrose on behalf of Sand Springs Ranch has filed a Motion to File Late Response is for water right 36-00051A and there that is the Mildren claim. The claim which is in the investigative file and in my affidavit states that 1.2 cfs is sought for 4 acres. That's 15 inches to the acre. The Director's recommendation, and there is a claim verification report in the file, a field exam was done July 24, 1990 as shown by hand written notes on the claim verification file, page 15 of the claim verification file.

Mr. Brown: Your honor, if I could just interrupt and make an objection and ask for a continuing objection. As the Court knows, uh I believe all of this is hearsay and it's not accepted hearsay and uh it's inappropriate for the Court to consider any of it as evidence. Having said that, I'd like to ask for a continuing objection so I don't have to interrupt Ms. Beeman.

S.M. Dolan: Ok, that will be noted for the record. Thank you Mr. Brown.

Ms. Beeman: Your honor, we are not parties to this subcase at this time and we have not been allowed discovery to ask questions of the claimants in these cases. The public record at the Department of Water Resources is a reasonable way for these moving parties to obtain information about the nature of the discrepancy between what is claimed and what is recommended based upon an investigation. The claim verification file on 36-00051A shows that an inch to the acre standard was applied with a reasonable loss and the Department recommended 2 inches to the acre. So, we have a difference of a claim which seeks 15 inches to the acre and a recommendation by the Department that seeks 2 inches to the acre. That's a justiciable

controversy. But there is no one at this point to stand in the shoes of the Director to defend that report before the Court. And Rule 55(c) standard would say that this is a meritorious defense. There are similar facts which can be gleaned from the investigative file on the two matters that May Farms Ltd. has filed Motions to File Late Response. I'll look first at the Ya-Ta-Hay file. The claim in that file and as shown on our demonstrative chart shows that 63 acres were claimed and that 7.5 cfs were claimed for those 63 acres. That's 5.9 inches to the acre. The claim verification report shows that a field exam was done by the Department of Water Resources on July 24, 1990. The claim verification report shows a quarter quarter section and investigation of five acres that were claimed as irrigated. The Department's recommendation was for 55 acres. I'm referring to pages within the claim verification report which is a standard part of each of these files. It's a form and then there are hand written notes on it. Then the Department's recommendation as shown in the Director's report, was that 1.3 cfs should be recommended. This is the difference between 1.6 inches to the acre which the Director recommends and 5.9 inches to the acre which the claimant maintains. These are the issues that are the face are the concerns to the ground water users. Let me quickly go the fourth one because any facts that I have to do on McFadden I will wait to do with the argument with Mr. Fereday to the extent that we can do that together. The last one with May is the Gisler claim which is 36-00021. The claim seeks 212 irrigated acres with a rate of diversion, I have 14.4 cfs. The claim verification shows that a field exam was done on 8/16/90, which would be August 16, 1990 and the acreage was recommended at 149 acres after that field exam and the rate of diversion was recommended at 4.82 cfs. So we have a difference there of 5.7 inches to the acre claimed and 1.6 recommended by the Director. Again, that is a big discrepancy and it creates a justiciable controversy that is not going to be a waste of the Court's resources. [End of Tape 1 (labeled as Tape 5)]

Ms. Beeman: [Beginning of Tape 2 (labeled as Tape 2)] My final comment,

S.M. Dolan: Changing tapes. Go ahead.

Ms. Beeman: Thank you. My final comment at this point under the meritorious defense standard is that these movants, May Farms Ltd. and Sand Springs Ranch, are claimants within the Snake River Basin Adjudication. They are already parties to the umbrella case. They are ground water users from the Eastern Snake Plain Aquifer and as a matter of public record, the conjunctive management rules for the Idaho Department of Water Resources has determined that the Eastern Snake Plain Aquifer is a common ground water supply and they cite to a USGS report. And under the conjunctive management rules these ground water users are subject to call and they have to defend their water rights. They may have to mitigate with water for dollars and they would assert that although withstanding is, probably not part of their meritorious defense, these ground water users are already parties to the Snake River Basin Adjudication. They are claimants within the same basin. They divert from the common aquifer as the spring users. They would maintain that to the extent the Court feels that there was a standing standard that must be met, they do meet that standard. I have nothing further at this time your honor.

S.M. Dolan: Thank you Ms. Beeman. Mr. Brown?

Mr. Brown: Your honor, first of all, let me start off with my objections to what Ms. Beeman has attempted to do here. She comes before the Court today and refers to the IDWR claims file. She's not referring solely to the pleadings that were attached to her affidavit. That is plainly an attempt to introduce evidence beyond the scope of 60(d) without excuse. The IDWR claim files are certainly investigations of this case. They are inadmissible here today. Plainly and simply they're not before the Court. Moreover, it is fundamentally unfair for her to

attempt to offer those at this point in time. As is recited

Ms. Beeman: Your honor, I must object. Mr. Brown is mischaracterizing the pleadings in this case. The documents I've just referred to are the identical documents to the documents that were filed with my affidavit before the Court. He has characterized me as having filed something else with the Court and that what I referred to today is yet another set of documents. They are the identical documents. The documents filed with the Court with my affidavit on August 18 are identical to the documents I just referred to in my substantive motion.

S.M. Dolan: Um, hum.

Mr. Brown: Then for the record, it should be clear that you're referring to the pleadings only and not to the claims files which were attached to none of the affidavits I received.

Ms. Beeman: Your honor and Mr. Brown, my affidavit contains a copy of the entire file at Water Resources. It includes the claim, it includes the claim verification report. It includes objections. I have only recited to selected portions of it to elucidate to the Court and parties the nature of the meritorious defense and justiciable controversy that is before the Court.

Mr. Brown: Well your honor, I will represent that we did not receive the entire claims file attached to her affidavit. But let me make, be that as it may, I'll be happy to bring up later and show the Court what we received. Secondly though, this stuff is nevertheless objectionable and it is fundamentally unfair for them to attempt to use it. I would like to refer the Court to a case which I think is a case that collects numerous other cases and expresses all the concepts which we're talking about here today. It's found at 691 P.2d 642. That's a California case, Mitchell vs. the State Superior Court of Fresno County and included another party, Shell Oil Company. That case the Court reviews all kinds of cases dealing with the attorney-client work product, privilege and the attorney-client privilege. What has happened in this case as is reflected in the deposition testimony of each of these individuals, we attempted to ascertain the factual basis for any of the assertions they were making. But when we asked questions about the information which was the basis for intervention in every instance May refused to answer, Ambrose refused to answer. And they stated that they were claiming either work product or attorney-client privilege in each instance. Questions such as what information did you look at in the process you undertook to determine what subcases to object to. Tell me how May Farms determined which cases it would intervene in. I could go on and on where we asked what information they have. In each instance they claimed that it was attorney-client privilege. Now, your honor, I think the law concerning due process and fundamental fairness is pretty clear. I think the purpose of the rules of evidence and discovery are pretty clear. I think they are being egregiously violated here. If a party chooses to assert that some factual information is confidential, they can not later simply go back on their claim of privilege and attempt to present it to the Court. As a matter of fundamental fairness once they claim the privilege, they're estopped from using it later in open Court after denying us the opportunity of knowing what it was. Essentially what has happened here is the rules of procedure served the purpose of eliminating trial by ambush. The entire purpose of the rules is so that the facts all come forth during discovery so that we have an opportunity to prepare so that we don't have an ambush. The only factual basis asserted in the deposition was claimed to be confidential communications. They cannot now come in and recite to the Court, well Judge they're not really confidential I'm reading to you from the record here and everything else. I've absolutely been deprived of knowing any of that. And I think there are cases around the United States that deal with that situation. And

Mr. Cranney is that way, and his motion should be granted your honor. Thank you.

S.M. Dolan: Thank you Mr. Fereday. Well, before I give Mr. Brown a chance to respond. Mr. Fereday, if the Court were to come up with a way for the Director's report to be presented, would that satisfy your clients concern.

Mr. Fereday: No.

S.M. Dolan: Or did they need to present the report and then actively argue in favor and cross examine and all the things associated with being a party?

Mr. Fereday: The latter your honor. I think, and I'm acceding to both the Supreme Court and Judge Hurlbutt's views as to the role of the Department now. But that role even if it were to allow the Department employees to be questioned by the Special Master or by the Judge, even if that is the case, then still I don't read Judge Hurlbutt's or the Supreme Court's rulings as going so far as allowing the Department of Water Resources to make legal argument, to submit memoranda, to engage in discovery, to cross examine, or even to call witnesses for direct examination.

S.M. Dolan: So the Director's role that your concerned with having been lost or taken away is not simply his report, his presentation of facts. But rather his defense of that as well as the law and the facts.

Mr. Fereday: That's correct your honor. And obviously, the defense of the position, such as the position displayed on the chart, the defense also has to evolve or in many cases will evolve an offense if you will. Such as, ok, show me where your putting 13 inches to beneficial use on 2 acres of pasture. Lets see the ground. These kinds of fact development opportunities are, the way I see it, lost to the Department. It simply, as I understand your hypothetical here, would be restricted to coming in and answering questions presumably by the Special Master or the Court as to what did you mean by this? What does this mean, what did you do here and so forth. And by the way, then presumably, they would be subject to cross examination, but the fact is that the Department would be in the case in an extremely limited role and that is, that too does not survive and argue a common sense analysis of what a court case is supposed to do. What fact finding is supposed to involve in a court of law. That ties us, again into the due process problem. So, and I think that's what Judge Hurlbutt had in mind. I think he had exactly that kind of scenario in mind where either the Department is not present in that courtroom, simply the document is, or if the Department is present, it has an extremely circumscribed role.

S.M. Dolan: Thank you Mr. Fereday. Since we have several closely aligned with your position, Ms. Beeman and Ms. Hofstetter do you want to speak to Mr. Fereday's motion before we get to Mr. Brown's response.

Ms. Beeman: If I could just quickly, I would like to incorporate what substantive arguments we made this morning on Sand Springs Ranch and May Farms Ltd. Those same substantive arguments would apply here and certainly are in accord with the argument that Mr. Fereday has made. Would this be the appropriate time, as I did with the other four, I just quickly listed some facts to show the basis for those facts on the chart. I will do that now unless that should come later. I can do that quickly.

S.M. Dolan: Well lets get everything out in favor of the motions to respond.

Ms. Beeman: Ok, this would be in support of that. I'll do it right quick.

S.M. Dolan: You'll get your chance Mr. Brown.

Ms. Beeman: And what I might say, and I think I neglected to say that this morning, as _____ to Mr. Fereday's argument. A real concern that May Farms Ltd, Sand Springs Ranch and Faulkner Land and Livestock have is who will conduct the cross examination of Mr. Brown's clients? If you have the Department come in just to put their investigative work there, who takes that next step of the cross examination? And that is a concern I believe Mr. Fereday was addressing in terms of finding out what the water use is. You have to have good cross examination. I'll just quickly list what some of those salient facts are looking first at 36-00048A for Mr. McFadden. And again, this is referring to the document filed with my affidavit on August 18.

Mr. Brown: Your honor, if I could make a continuing objection again.

Ms. Beeman: These are the same facts as cited in the affidavit of Faulkner Land and Livestock . . .

S.M. Dolan: And resetting these facts based on . . .

Ms. Beeman: This is just out of the public record for the SRBA claim 36-00048A that was submitted to the Court and to the parties.

S.M. Dolan: I asked before, Mr. Brown has copies of these documents you're referring to.

Ms. Beeman: Yes, this is what was served. I have a certificate of service with each of the filings.

S.M. Dolan: Ok, Mr. Brown your objection is noted.

Ms. Beeman: The claim was left at 178.5 acres were claimed. And that the cfs for that claim shows his 10 cfs. Now, I keep referring to these claim verification reports, we have here in hand right here on the claim verification report that on July 26, 1990 the Department of Water Resources did a field exam and further in the claim verification report where they're doing the rate and volume calculation is, the pump capacity is 1.04 cfs. So, one of the elements of the judicable controversy on McFadden's claim for 36-00048A is that the diversion rate can divert 1.04 cfs but there is a claim for 10 cfs. And the Department's recommendation was in accordance with the capacity of the pump and is reflected in the Director's report. Now turning to 36-00049, also a claim by Mr. McFadden, our chart shows that there's a claim for 178.5 acres. That is with the agency records that we submitted on August 18. The, oh excuse me, the claim also lists 9.7 cfs. Then the claim verification report shows that there are 175.5 acres that were irrigated. The field exam was done on July 26, 1990 just reading again from the handwritten note on the claim verification report and based on that, in the files also contain research notes on the claim file itself. I'm looking at a research note dated 10-21-92 that based on a mid-crop grown, they were going to allow .023 which is a little more than an inch to the acre and that times the 175.5 is 4.04 which is what the Department recommended. So, what we have is a claim for 9.7 cfs which amounts to 2.7 inches to the acres. We have a recommendation that went above 1 inch per acre by their own statement because of a mid-crop he'd grown that gives 1.15 inches to the acre. So again, this is just to support the meritorious stance that there is a justiciable controversy here which is the basis for the ground water users wanting to be able to come in to continue to defend the Director's report and take the next steps in litigation that

would be necessary following the filing of response. That would end our presentation. We think the Motion to File Late Response in all six cases should be granted.

S.M. Dolan: Thank you. Now back to you Mr. Fereday just briefly, your arguments were made on behalf of Cranney Bros. only. That's your only client here today?

Mr. Fereday: That's correct your honor.

S.M. Dolan: I noticed that, lets see, Cranney Bros., the files I have in front of me, they're the movants in five of them and as I understand, Ms. Beeman you're incorporating your earlier arguments in support of all five of those.

Ms. Beeman: On the five filed on behalf of Cranney Bros. there are two that are in common with these six.

S.M. Dolan: Yes, that's true. That's true.

Ms. Beeman: I think there are nine different subcases here today.

S.M. Dolan: Well the ones I have in front of me are the five other than the four we've already heard this morning.

Ms. Beeman: Right. That works out.

S.M. Dolan: I hope I've got the math right. Mr. Brown before you get started, I'm going to turn on the air conditioning a little bit, I'm getting a little warm up here. We'll turn it down to 40 degrees and see if we can start this up. Ok. Now, Mr. Brown, you're up.

Mr. Brown: Thank you again for that comment. I see no need to repeat what I said this morning about the standards or otherwise. I want to get noted for the record that Mr. Fereday was here during those arguments also, so what I said this morning was something he is fully informed of. Given that, let me begin by responding to the points. First point has to do with reading Judge Hurlbutt's order. Each of these parties continues to assert that all Judge Hurlbutt required was for somebody to copy the Director's report and file a motion. The language of the order does not support that argument. He said only that Some parties had decided not to participate in the subcases. He said that they were instead choosing to rely on the Director's report and that obviously refers to during the objection and response period not in 1985. After he states all that, he said that it necessitates special consideration for Some parties. Obviously this point of the parties who had decided not to participate in certain subcases. There's no factual record to support an allegation by any of these movants that they rely on the Director or decided not to participate in any of these subcases. In other words, the record is quite the contrary. Deposition of Mr. Cranney confirms he did not even read the entire IDWR claim file. He hired Some attorneys to do it. He hired the attorneys for IGWA to do it, Mr. Fereday. And that happened after what Mr. Fereday has called the host objection response events, Musser, A & Mr. Brown: Call and the like. Don't think those are the things which fall within Judge Hurlbutt's order. He also misconstrued or misunderstands the distinction between offering admissible facts and once that evidence is in then the Court would read it as being true. That doesn't mean he is relieved of his burden of getting admissible facts, competent testimony in front of the Court, he's not done that. Judge Hurlbutt was quite clear on that in the order portion of the order where he said they